Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1–24–2081 OF 2002

JAMES FOONG J

27 JULY 2004

Land Law — Restraints on dealings — Caveat — Application to court for removal of — Whether by way of summons in chamber — Rules of the High Court 1980 O 32d

Land Law — Restraints on dealings — Caveat — Grounds for caveat to remain — Whether there is serious question to be tried — Whether can raised issues of limitation

Land Law — Restraints on dealings — Caveat — Who can enter caveat — Whether registered owner can enter caveat on own land

The defendant was the registered owner of four pieces of land ('the said lands') charged to Bank Bumiputra Malaysia Bhd ('BBMB') by way of a third party charge for a loan facilities granted to Kredin Sdn Bhd ('Kredin'). The plaintiff later acquired the loan granted to Kredin and the security over the said lands from BBMB under a vesting certificate pursuant to Pengurusan Danaharta Nasional Berhad Act 1998. The defendant then commenced an action against the plaintiff and BBMB ('the 85 Suit') to nullify the rights of BBMB and the plaintiff over the said lands on the grounds that their rights were statute barred and the vesting certificate was null, void and of no effect. The defendant also applied for an interlocutory injunction restraining the plaintiff and BBMB from dealing with said lands until disposal of the 85 Suit. The Court of Appeal allowed the injunction but it was set aside by the Federal Court. The Federal Court also dismissed the 85 Suit. However, the plaintiff still faced the caveats placed by the defendants on the said lands. The plaintiff then made an application by way of an originating summons to remove the caveats. During the hearing of the application, the defendant raised three preliminary objections, ie: (i) the application made was wrong in procedure; (ii) res judicata as the issues relating to 'serious question to be tried' had already been determined by the Court of Appeal; and (iii) the plaintiff was not an aggrieved party. In support that the caveat should remain as there were serious question to be tried, the defendant raised, inter alia, the following arguments: (i) that the plaintiff's rights and interest in the said land was statute barred; and (ii) the vesting certificate was null, void and no effect as there was nothing to vest at the vesting date as limitation had set in.

Held, allowing the application with costs:

(1) Although the 85 Suit concerned the said lands, the caveats were never an issue raised therein. It is only when the caveats are specifically raised or made an issue then under O 32d of the Rules of the High Court 1980, it would be more appropriate to proceed by way of summons in chamber (see para 13).

(2) The very fact that the Federal Court discharged the injunction granted by the Court of Appeal must be viewed as having accepted a ruling that there was no serious question to be tried and that the Court of Appeal's ruling of there being one was erroneous. Morever, there were other factors not considered by the Court of Appeal which now appear in the instant application in deciding whether there was a serious question to be tried (see para 15).

(3) The plaintiff fell within the category of an aggrieved party under s 327 of the National Land Code since the presence of the caveats had wrongfully affected the plaintiff's title to the said lands and the plaintiff would suffer loss as the lands with caveat were less attractive in the property market (see para 20).

(4) There was no serious issue to be tried, as: (i) the registered owner of land could not enter caveat on its own land; and further (ii) it was clear that the defendant could not bring a claim of limitation against the plaintiff based on the circumstances of the case because limitation was merely a defence to an action and could not be a cause of action (see paras 25, 31 and 41).

[**Bahasa Malaysia summary**

Defendan adalah pemilik berdaftar empat bidang tanah ('tanah tersebut') yang digadaikan kepada Bank Bumiputra Malaysia Bhd ('BBMB') melalui gadaian pihak ketiga untuk satu kemudahan pinjaman yang diberikan kepada Kredin Sdn Bhd ('Kredin'). Plaintif kemudiannya mengambil alih pinjaman yang diberikan kepada Kredin dan cagaran berhubungan tanah tersebut dari BBMB melalui sijil letak hak di bawah Akta Pengurusan Danaharta Nasional Berhad. Defendan memulakan tindakan terhadap plaintif dan BBMB ('Guaman 85') untuk membatalkan hak-hak BBMB dan plaintif ke atas tanah tersebut atas alas an hak-hak mereka digalang statut dan sijil letak hak adalah batal, tak sah dan tidak mempunyai kesan. Defendan juga memohon satu injunksi interlokutori menahan plaintif dan BBMB dari membuat urusan berhubung dengan tanah tersebut sementara menunggu Guaman 85 diputuskan. Mahkamah Rayuan membenarkan injunksi tersebut. Akan tetapi ianya diketepikan oleh Mahkamah Persekutuan. Mahkamah Persekutuan juga menolak Guaman 85. Namun begitu, plaintif masih berhadapan dengan kaveat-kaveat yang dimasukkan oleh defendan-defendan pada tanah tersebut. Plaintif kemudiannya membuat permohonan melalui saman pemula untuk membuang kaveat tersebut. Semasa permohonan didengar, defendan membangkitkan tiga bantahan awal iaitu: (i) permohonan ini salah prosedur; (ii) res judicata kerana isu-isu berkait dengan 'persoalan serius yang perlu dibicarakan' telah diputuskan oleh Mahkamah Rayuan; dan (iii) plaintif bukanlah pihak terkilan. Bagi menyokong kaveat hendaklah dikekalkan kerana terdapat persoalan serius kena dibicarakan, defendan mengutarakan, antara lain, alasan-alasan berikut: (i) hak dan kepentingan plaintif dalam tanah tersebut digalang statut; dan (ii) sijil letak hak tidak sah, terbatal dan tiada kesan kerana tidak apa yang boleh diletak hak pada tarikh peletakan hak kerana digalang had masa.

Diputuskan:

(1) Walaupun Guaman 85 berkait dengan tanah tersebut, namun begitu isu kaveat tidak pernah dibangkitkan. Hanya apabila kaveat dibangkitkan secara khusus atau dijadikan isu barulah mengikut A 32d Kaedah-Kaedah Mahkamah Tinggi 1980, ianya harus dimulakan melalui saman dalam kamar (lihat perenggan 13).

(2) Keputusan Mahkamah Persekutuan melepaskan injunksi yang diberikan oleh Mahkamah Rayuan hendaklah dipandang sebagai membuat keputusan yang tiada persoalan serius untuk dibicarakan dan bahawa Mahkamah Rayuan telah silap dalam membuat keputusannya. Tambahan pula, terdapat faktor lain yang tidak dipertimbangkan oleh Mahkamah Rayuan yang sekarang ini dibangkitkan di dalam permohonan semasa dalam memutuskan sama ada terdapat persoalan serius yang kena dibicarakan (lihat perenggan 15).

(3) Plaintif tergolong di dalam kategori pihak terkilan di bawah s 327 Kanun Tanah Negara kerana kewujudan kaveat tersebut telah secara salah memberi kesan kepada hak milik plaintif ke atas tanah tersebut dan plaintif akan menanggung kerugian kerana tanah yang mempunyai kaveat kurang menarik di pasaran hartanah (lihat perenggan 20).

(4) Tiada isu serius yang perlu dibicarakan kerana (i) pemilik berdaftar tanah tidak boleh memasukkan kaveat ke atas tanahnya sendiri; dan selanjutnya (ii) adalah jelas pada undang-undang yang defendan tidak boleh menuntut batasan terhadap plaintif berdasarkan fakta kes semasa kerana had masa hanyalah satu pembelaan kepada sesuatu tindakan dan bukannya satu kausa tindakan (lihat perenggan 25, 31 and 41).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3312.

For caveats generally, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [150.214]–[150.240].

Cases referred to

Affin Bank Bhd v Dato' Mohamed bin Embong [2002] 1 MLJ 475 (refd)
An Application by Haupiri Courts Limited, Re (No 2) [1969] NZLR 353 (refd)
Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd [1992] 2 MLJ 504 (refd)
Cotterell v Price & Others [1960] 3 All ER 315 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)
Horner & Cartwright 11 July 1989 (refd)
Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152 (folld)
J Raju v Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 417 (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)
Lewis v Plunket [1937] 1 All ER 530 (distd)

Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors [1994] 1 MLJ 136 (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651 (refd)
Saw Cheng Boon v Mohd Farook b Shaik Mohaidin [1995] 3 CLJ 759 (refd)
Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim [1993] 3 MLJ 231 (refd)
Tan Su Sing v Haluan Kreatif Sdn Bhd 8 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2796, [1998] 1 CLJ Supp 407 (refd)
United Malayan Banking Corporation Bhd v Development and Commercial Bank (Ltd) Bhd [1983] 1 MLJ 165 (refd)

Legislation referred to

Limitation Act 1953 ss 21(1), (2), (5)
Limitation Act 1939 [UK] s 23(a)
National Land Code s 327, Form 16D
Pengurusan Danaharta Nasional Berhad Act 1998 ss 14(7), 16(1), 19(2), (3), 72
Real Property Limitation Act 1833 [UK] s 34
Real Property Limitation Act 1874 [UK] s 1
Rules of the High Court 1980 O 5 r 3, O 32d

SM Yoong (TC Lim with her) (Shook Lin & Bok) for the plaintiff.
Bastian Pius Vendargon (Jayaraman, Ong & Co) for the defendant.

James Foong J:

INTRODUCTION

[1] Enclosure 1 is an application of the plaintiff, by way of originating summons, to remove caveats placed on 4 pieces of land held under Grant 31902, 31903, 31904, 31905 for Lots 267, 268, 269 and 271 respectively, all in section 0063, Bandar of Kuala Lumpur ('the said lands') by the defendant.

BACKGROUND

[2] The background of this case is as follows:

[3] The defendant is the registered owner of the said lands. These lands were charged to Bank Bumiputra Malaysia Berhad ('BBMB'), by way of a third party charge, for loan facilities granted to a company known as Kredin Sdn Bhd ('Kredin'). Kredin failed to repay the loan to BBMB. This resulted in BBMB foreclosing on the said lands after initially issuing to the defendant the statutory notice of demand which was not satisfied.

[4] An order for sale was obtained by BBMB on the said lands. Before any success could be achieved at the public auction, the defendant filed a motion to set aside the order for sale on the ground that Form 16D of the National Land Code ('the NLC') was not served on the defendant's registered address. This motion was dismissed by the judge of first instance but on appeal, the Court of Appeal allowed the appeal.

[5] Subsequent to the decision of the Court of Appeal, BBMB on the 13October 1998 issued and served a fresh Form 16D of the NLC on the defendant.

[6] On the 7 May 1999, the plaintiff acquired the loan granted to Kredin and the security over the said lands from BBMB under a vesting certificate permitted under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act').

[7] This was soon met by a suit from the defendant filed on the 23 January 2002 in the High Court at Kuala Lumpur bearing number S5–22–85 of 2002 ('the 85 Suit') where the defendant named Bumiputra-Commerce Bank Bhd ('the successor of BBMB') as the first defendant and the plaintiff as the second defendant. Basically, this action sorts to nullify the rights of these two parties over the said lands for reason that their rights are statute barred and that the vesting certificate is null, void, and of no effect.

[8] As an interim measure, the defendant applied in the 85 Suit for an interlocutory injunction to restrain the plaintiff and Bumiputra Commerce Bank Bhd from dealing with the said lands until disposal of the 85 Suit. Azmel J disallowed this after hearing the application inter parte. An appeal was lodged with the Court of Appeal over this decision. The Court of Appeal allowed the appeal. This matter then proceeded to the Federal Court where the question referred to concerns: whether s 72 of the Danaharta Act is unconstitutional and therefore void.

[9] The Federal Court on the 16 January 2004 answered the said question in the negative and the interim injunction granted by the Court of Appeal was set aside.

[10] Though without the injunction, the plaintiff still faces the caveats placed by the defendant on the said lands. The plaintiff now desires to have them removed.

PRELIMINARY OBJECTIONS

[11] During the hearing of encl 1, the defendant raised three preliminary objections which I shall deal with in turn.

1 This application by way of originating summons is wrong in procedure

[12] The first preliminary objection is that plaintiff has adopted a wrong procedure in making this application; it should be by way of summons in chambers under the 85 Suit since O 5 r 3 of the Rules of the High Court 1980 ('the RHC') expressly states that such procedure does not apply in a pending proceeding, and 85 Suit is a pending proceeding relating to the said lands.

[13] I disagree with this argument. Though the 85 Suit concerns the said lands these caveats are never an issue raised therein. It is only when these caveats are specifically raised or made an issue, either in the form of a claim or counterclaim, then under O 32d of the RHC it would be more appropriate 'to rely upon as was suggested in the case of *Tan Su Sing v Haluan Kreatif Sdn*

Bhd 8 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2796, [1998] 1 CLJ Supp 407 ... to proceed by way of summons in chamber' — *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152 at p 165.

2 The plaintiff is estopped from raising the factor concerning a serious question to be tried since it has already been determined by the Court of Appeal in the 85 Suit when granting the interim injunction; and as such res judicata also applies

[14] The second preliminary objection of the defendant is that the Court of Appeal has found a serious question to be tried when allowing an interim injunction in favour of the defendant in the 85 Suit. This finding, as claimed by the defendant, was never overruled by the Federal Court which concentrated only on whether s 72 of the Danaharta Act is unconstitutional. Since the principles in determining removal of caveat is similar to that of granting or a refusal of an interim injunction the said ruling by the Court of Appeal (of there being a serious question to be tried) would estoppe the plaintiff from denying this fact here; res judicata should similarly apply under these circumstances.

[15] I am afraid that the defendant has a wrong perception of the Federal Court's ruling vis a vis that the apex court did not disturb the finding of the Court of Appeal on the issue of there being no serious question to be tried. The very fact that the Federal Court discharges the injunction granted by the Court of Appeal and reiterated that 'clearly sales of these properties would be substantially delayed if injunctive relief was available' must be viewed as having accepted a ruling of there being no serious question to be tried and that the Court of Appeal's ruling of there being one was erroneous.

[16] Further, there are other factors not considered by the Court of Appeal which now appear in this instant case in deciding whether there is a serious question to be tried. These are: (a) the inability of the defendant in mounting a cause of action based on limitation; (b) limitation in the circumstances of this case does not run based on the facts as disclosed and; (c) even if it does, it has no effect on the rights of the plaintiff under the Danaharta Act.

[17] **[17]**For these reasons, I find no merits in this second preliminary objection of the defendant.

3 Plaintiff is not an aggrieved party

[18] According to the defendant, since ss 16(1) and 19(2) and (3) of the Danaharta Act permit the plaintiff to deal with and transfer the said lands irrespective of the presence of the caveats, the plaintiff cannot be considered as 'an aggrieved party' under s 327 of the NLC.

[19] The test to determine whether a party is an 'aggrieved party' under s 327 NLC has been pronounced in a number of authorities. In *Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 MLJ 136 at p 142, it is 'a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something'. And in the Federal Court in *United Malayan Banking Corporation Bhd v*

Development and Commercial Bank (Ltd) Bhd [1983] 1 MLJ 165 at p 167, it seems to be whether a person 'would suffer loss if the caveat was not removed'.

[20] The plaintiff though accepting that it has powers to deal with and to transfer the said lands to a third party despite the presence of the caveats, the said lands are less attractive in the property market since a purchaser would still encounter these caveats if they are not removed. In short, the plaintiff is of the view that though Danaharta Act allows the plaintiff to sell the said lands to a purchaser despite the existence of these caveats, these caveats would continue to remain on the document of title after the transfer to the purchaser.

[21] Applying the test to determine whether a person is an aggrieved party to the circumstances of this case, I find that the plaintiff falls within this category of an aggrieved person under s 327 of the NLC. I hold the view that the presence of these caveats has wrongfully affected the plaintiff's title on the said lands and the plaintiff would suffer loss if they are not removed in the sense as described and explained by the plaintiff above. With these, I reject this third preliminary objection of the defendant,

SUBSTANTIVE ARGUMENTS

Principles to be applied

[22] In the locus classicus case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, it is declared that to consider an application of this nature the test is first: the caveator must satisfy the court that his claim to an interest in the land does raise a serious question to be tried, and second: that on the balance of convenience whether it favours the caveat to remain.

[23] When I inquired into degree and depth of indulgence in examining the circumstances of the case for application, I was directed to a passage of the Supreme Court in *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 at p 270 that announced it: 'must be minutely inquired into in order to decide whether the caveat should remain on the register of document of title or be removed'.

[24] Bearing these principles in mind, I shall proceed to analyze this case.

First issue: Can a registered proprietor caveat its own land?

[25] At the outset, on the first factor of whether there is a serious question to be tried, I find none. This is based on the legal proposition that a registered owner of the land cannot enter a caveat on its own land. Cases in support are: *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504, *Affin Bank Bhd v Dato' Mohamed bin Embong* [2002] 1 MLJ 475, *Saw Cheng Boon v Mohd Farook b Shaik Mohaidin* [1995] 3 CLJ 759, *Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim* [1993] 3 MLJ 231 as well as *Re An Application by Haupiri Courts Limited (No 2)* [1969] NZLR 353.

[26] There is of course the obiter remark by Justice Wan Yahaya in the Supreme Court case of *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 417 which says:

> Recently in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, this court upheld the declaratory decree and the consequential reliefs granted by the Johor Bahru High Court in respect of an improper auction sale by a SAR who was found to have acted ultra vires the NLC.
>
> In the same manner, we hold that the chargor in this case would have a caveatable interest if he could satisfy the court that his claim to the interest in the property would raise a serious question to be tried. See *Eng Mee Yong & Ors v V Letchumanan*.

[27] But I agree with Vincent Ng J's view expressed in *Saw Cheng Boon v Mohd Farook b Shaik Mohaidin* that:

> … this case (*J Raju v KYB Bhd*) cannot be taken as authority that a registered proprietor has locus standi to enter a caveat against his land under s 323(1)(a) NLC as ...this issue was not the ratio decidendi of that case and it was cited as oblique authority due to the absence of adverse comments by the Supreme Court against the registered proprietor therein who had caveated his own land. As, s323(1)(a), clearly and unambiguously provides that only a person or body claiming title to or any registrable interest in any alienated land or any right to anysuch title or interest, may caveat the land, surely, for a person who has filed asuit concerning his land to logically claim that he is in the position of one claiming title or any registrable interest in such land, would entail an unwarranted stretch of language, since he is already the legal owner of the title, and as such legal owner, the question of 'any right to any such title or interest' also could not possibly arise.

Second Issue: Can the defendant succeed in its claim under 85 Suit

[28] Though there is no necessity for me to proceed further, but for completeness and to cater for any eventuality that I erred on my finding on the 1st issue by the Court of Appeal, I shall proceed to deal with other matters raised.

[29] The plaintiff has asserted that the defendant's entire foundation on the existence of a serious question to be tried is dependent on the claim that the plaintiff's rights and interest in the said lands is statute barred. It comes in this manner:

[30] As the result of Kredin's failure to repay the loan, BBMB had issued a statutory notice of demand to the defendant on the 24 December 1985. Ifone were to commence calculation of 12 years from this date (for the purpose of s 21 of the Limitation Act 1953) the last day would end on the 23 December 1997. It is pivotal on this that the defendant is attempting to establish that the plaintiff is barred from asserting its rights to the said lands and thus entitled to succeed in the 85 Suit as well as establishing in this application a serious question to be tried.

[31] But one thing which is overlooked by the defendant is that limitation is merely a defence to an action and cannot be a cause of action. For support

of this legal proposition: *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651 where Gopal Sri Ram JCA succinctly expressed (at p 660):

> Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice of the Board of the Privy Council in *Hari Nath Chatterjee v Mothurmohun Goswami* (1894) ILR 21 Cal 8 at p 18: 'The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right'.

[32] In the 85 Suit, the plaintiff was not the person who initiated the action to enable the defendant to rely on such defence of limitation. It is the other way round. Therefore, the defendant's claim cannot succeed.

[33] Refusing to concede, the defendant's counsel tendered to this court three English authorities to firstly nullify the above proposition and then to support the defendant's argument that a claim, based on limitation, can be instituted rather than merely to act as a remedy in a defence. I shall comment on these cases in turn with the latest decision first.

[34] In *Horner & Cartwright*, a decision of the English Court of Appeal handed down on the 11 July 1989 and reported in transcribed form bears only these backgrounds:

[35] The appellant, a solicitor, sued the respondent to recover a sum of Pounds Sterling 720.00 for legal fees due and owing by the respondent to him. Concerned that his claim may be statue barred, the appellant relied on the acknowledgements of such debt by the respondent in various events to support his claim. Apparently, under s 23(a) of the English Limitation Act 1939, 'the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.'

[36] But what is the cause of action in this case cited? If the cause of action is for a recovery of a debt and evidence to support this were the acknowledgements then this case is a poor example of the court entertaining a claim based on a statute of limitation. I presumed that the learned counsel for the defendant may be mislead by page two of the judgment of this case where it states that: 'The relief sought is a declaration that the rights are barred by the 1939 Act and an order setting aside any charge for any registration' to support his claim. But after careful reading of the preceding paragraphs of the transcript, I comprehend that this statement refers to a previous case where the plaintiff based his assertion of acknowledgement. This was not the relief sort in this instant case. With these reasons, I find this English case not supportive of an alternative approach as canvassed by the defendant.

[37] The second case is *Cotterell v Price & Others* [1960] 3 All ER 315. Here, the plaintiff is vested with a second mortgage on a piece of property belonging to the third defendant. There is a first mortgage vested in the first

and second defendant. The third defendant is wound up. Anticipating that his rights to foreclose on the said property would be time barred, the plaintiff elected another route to seek satisfaction. He gave notice to the trustee in bankruptcy of the third defendant to elect whether the trustee would exercise the option to redeem the security from the first and second defendants otherwise he intended to proceed with redemption of the said property from the first mortgagor (the first and second defendants) and thereafter secured the said property for himself after the redemption. The trustee did not exercise the option whereupon the plaintiff filed this action to enforce his rights as intended.

[38] Again, like the case referred to earlier, the cause of action here is not one that is founded on a statute of limitation. Realizing that he may be met by a defence of statutory limitation, the plaintiff elected to proceed by the alternative route stated to lay his claim. His claim is not founded on the statute of limitation; his objective was to circumvent it. As such, this case is no support for the defendant's proposition.

[39] The third case is *Lewis v Plunket* [1937] 1 All ER 530. Here the plaintiff has charged her property to the defendant for a loan granted to her. Since the defendant did not foreclose on the property after default in repayment over a substantial period of time, the plaintiff filed this action for: (a) a declaration that the mortgage under s 34 of the Real Property Limitation Act 1833 and, s 1 of the Real Property Limitation Act 1874 has extinguished and; (b) defendant do deliver the mortgage and other documents related thereto to the plaintiff.

[40] After reading the judgment of this case, I am of the view that the relevant sections of the Limitation Acts cited to support the plaintiff's case are specific provisions that allowed the plaintiff to bring such action. This can be perceived from the statement of Farwell J found in p 534 where the learned judge expressed that 'by virtue of the Real Property Limitation Act 1833, s 34, and the Real Property Limitation Act 1874, s 1, on the expiration of 12 years from 1921 the mortgagee, the defendant, ceased to have any estate or interest whatsoever in the land'. But in our Malaysian scenario, s 21(1), (2), (5) of the Limitation Act 1953 do not declare such right. Instead these sections commence with words like: 'No action shall be brought' or 'No foreclosure action ... shall be brought' are used. It is my view that by the nature of these phases and based on the principles founded on common law, our Malaysian courts have ruled that limitation cannot found an action but can be used a defence. Thus, this case cited can be distinguished and the approach therein cannot be accepted as a general proposition to lay a claim that our own Limitation Act can be used to found an action. On these, I again find this case of no support to the defendant's contention.

[41] This being the case, there exist no serious question to be tried since the law is clear that the defendant cannot bring a claim of limitation against the plaintiff based on the circumstances of this case.

Third issue: The vesting certificate

[42] Under s 14(7) of the Danaharta Act, a vesting certificate executed under the seal of the plaintiff stating that an asset has been vested in the plaintiff is 'conclusive evidence of such vesting as of the date of such vesting'. The vesting certificate tendered to this court (exh DUSB 1 in encl 2) is sealed on the 31 July 1999.

[43] The defendant took issue on this vesting certificate on two counts to support its contention that there is a serious question to be tried.

[44] The first is found in the affidavit of the defendant affirmed on the 14October 2002, where the defendant insists that the plaintiff 'is entitled to nothing and the vesting certificate is null, void, and of no effect as there was nothing to vest at the date of the alleged vesting on 31 July 1999 as limitation has set in before the purported vesting'.

[45] As restriction and limited application of the Limitation Act has been dealt with in depth under the first substantive issue, there is no necessity for me to elaborate at length once again why this contention must fail except to say that the alleged limitation under Limitation Act cannot act as a sword but only a shield to defend an action. In the present case, no action has been filed by the plaintiff where the defendant can use this as a defence. Instead, by this assertion, the defendant has reversed the role of a defender of an action and mounted an attack on the plaintiff under the 85 Suit by claiming that the vesting certificate is null and void and of no effect because limitation has set in. Under the principles stated, this cannot succeed.

[46] The second approach of the defendant is found in the statement of claim of the defendant in the 85 Suit where the defendant alleged that though the vesting certificate is sealed and dated 31 July 1999, the plaintiff had once given notice to the defendant that its rights to the said lands and the security thereto are vested in the plaintiff on the 7 May 1999. This is before the date of the vesting certificate. With this, the defendant avers that 'the purporting certificate is null and void and of no effect'.

[47] I am much puzzled over this stand as s 14(7) of the Danaharta Act clearly pronounced that a vesting certificate under seal shall be conclusive evidence of such vesting. So the effective date of the vesting is on the 31 July 1999. This is all that matters and if there is any assertion of an earlier vesting date then for conclusive evidence as to when vesting to the plaintiff legally took place it must be the 31 July 1999. It is on this date that the plaintiff is relying on to effect its rights to remove the caveats. If there is a notice given by the plaintiff announcing an earlier vesting date then that date is not conclusive evidence of the vesting. But the plaintiff did not base its stand on that date to make this application. The plaintiff has relied on the vesting of the 31 July 1999, as can be seen from its affidavit filed in support of this application where the plaintiff has categorically insists that its rights is derived from the vesting certificate dated the 31 July 1999. This, I find is sufficient in law to

justify the plaintiff's rights to the said lands and the issue raised by the defendant on the announcement of different vesting date is irrelevant.

Fourth issue: Calculation of time

[48] Even considering the time factor for limitation purpose, I cannot comprehend on the manner of calculation adopted by the defendant in view of the circumstances of this case. The first statutory notice dated 24 December 1985 has been declared ineffective by the Court of Appeal because it was not served at the correct address. This caused BBMB to issue a fresh Form 16D of the NLC notice on the 13 October 1998. I would consider the date of this second statutory notice to be the date of accrual for the purpose of the Limitation Act since the first statutory notice had been declared ineffective. Commencing calculation from the 13 October 1998 till today, the 12 year period imposed by the Limitation Act has not lapsed.

Fifth issue: Balance of convenience

[49] The said lands are within the golden triangle of Kuala Lumpur. Though there is a house thereon it is of no heritage or sentimental value. The real worth of the said lands is its commercial value with nothing thereon so that it could be developed. Thus, any damages resulting from the disposal of the said lands to a third party, if the caveats are lifted, could be quantified.

[50] On the financial standing of the parties there can be no doubt that the plaintiff, with the backing of the Malaysian Government, has far greater financial ability than the defendant. The defendant, as submitted by the plaintiff's counsel, is relatively poor with no business activity and had not filed its financial returns for the past 20 years. On this factor, the balance of convenience certainly leans in favour of the plaintiff who could afford to pay any amount of damages assessed by the court for the loss of the said lands in the event of the ruling in 85 Suit is in favour of the defendant. But if it is the other way round, then there is very little likelihood that the defendant could satisfy the plaintiff, monetary, for damages it suffered as the result of the caveats remaining. And in any event, the main element involved in this case is the fiscal aspect.

[51] The amount alleged to be due and owing to the plaintiff by the defendant as the result of the unpaid loan is substantial. And with interest thereon running by the day any delay in the disposal of the said lands would cause greater hardship to the defendant.

[52] Further, the sale of the said lands has been delayed on previous occasions and this has drawn strong comments from the Federal Court (as disclosed earlier) when removing the injunction imposed by the Court of Appeal in the 85 Suit. Such delay should not be occasioned once again by these caveats.

[53] Based on this, on the balance of convenience, I find against the defendant.

A CONCLUSION

[54] For reasons expressed above, I hereby allow the plaintiff's application in encl 1 with costs.

Application allowed with costs.

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Reported by Izzaty Izzuddin

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